



1994

EPA Runs CERCLAs around Bankruptcy Law: In Re CMC Heartland Partners

Catherine A. Barth

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Bankruptcy Law Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

Catherine A. Barth, *EPA Runs CERCLAs around Bankruptcy Law: In Re CMC Heartland Partners*, 5 Vill. Envtl. L.J. 203 (1994).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol5/iss1/8>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1994]

EPA RUNS "CERCLAs" AROUND BANKRUPTCY LAW: *IN RE CMC HEARTLAND PARTNERS*

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹ was enacted to protect the public and the environment from threats posed by hazardous waste disposal.² CERCLA is designed to remove these threats and place the burden of cleaning up hazardous waste on the responsible party.³ However, when the responsible party enters bankruptcy, the goals of CERCLA may be frustrated. For instance, a debtor's liability under CERCLA may be discharged and the government, not the responsible party, is left funding the cleanup.⁴ In contrast, when

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992)).

2. Enactment of CERCLA followed a wave of highly publicized incidents such as Love Canal and the "Kepone Disaster." These incidents prompted creation of the "Superfund" to finance government cleanup of hazardous waste sites. See H.R. 7020, 96th Cong., 2d Sess. (1980), reprinted in 1 *Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)* 1 (Comm. Print 1983) [hereinafter *CERCLA Legislative History*]. For further discussion of the financing of Superfund, see *infra* note 28 and accompanying text. The Love Canal disaster involved the condemnation of over 230 homes near Niagara Falls due to contamination from toxic wastes disposed of in the area. *CERCLA Legislative History*, *supra*, at 1. The released toxins resulted in high rates of birth defects, cancer, and emotional disturbances. *Id.* Similarly, the "Kepone Disaster" involved contamination of the James River in Virginia by the nerve-damaging chemical Kepone. *Id.* The contamination resulted in massive health problems and environmental damage. *Id.* at 2.

3. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990). The Eleventh Circuit noted that "[t]he essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on 'those responsible for problems caused by the disposal of chemical poison.'" *Id.* (quoting *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990)). Liability for cleanup does not always fall on the responsible party. Although CERCLA does not contain an express strict liability provision, strict liability is enforced against parties falling within the statutory liability scheme. See, e.g., *New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985).

4. For a discussion of discharge of CERCLA liability, see *infra* notes 66-103 and accompanying text.

Through the first five years of CERCLA enforcement, the federal government spent over \$119 million remediating hazardous waste sites. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, A SUMMARY OF FEDERALLY FUNDED REMOVAL ACTIONS 2 (1987). In fiscal year 1993 alone, the government spent approximately \$1.6 billion. Keith Schneider, *EPA Superfund at 13: A White Knight Tarnished*, N.Y. TIMES, September 6, 1993, at 7. EPA estimates that it will cost an additional \$15 billion to clean up the country's 1200 priority hazardous

the liability of a debtor survives bankruptcy and the debtor is faced with huge cleanup bills, the debtor is denied the "fresh start" envisioned by bankruptcy law.⁵

The current law regulating bankruptcy is embodied in the Bankruptcy Code, Title 1 of the Bankruptcy Reform Act of 1978 (the "Code"),⁶ which replaced the Bankruptcy Act of 1898.⁷ The Code contains no provisions dealing specifically with issues which arise under CERCLA.⁸ This has resulted in a tug-of-war between two powerful statutes, both with strong policy mandates pulling in opposite directions. CERCLA's goal is to impose the cost of cleanup on a responsible party while the bankruptcy laws aim to relieve debtors of burdensome liability. The result is a conflicting patchwork of case law with little consistency or predictability. Courts are split on almost every issue involving CERCLA claims in bankruptcy proceedings.⁹ Inevitably, in most cases one policy goal

waste sites. *Administration of Superfund Sites by EPA: Hearings of the Oversight Subcomm. of the House Ways and Means Comm.*, July 26, 1993, FEDERAL NEWS SERVICE, available in LEXIS, Nexis Library, Current file [hereinafter *EPA Hearings*].

5. EPA estimates that the average cleanup bill of a hazardous waste site is approximately \$35-40 million. *EPA Hearings*, *supra* note 4.

6. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1988 & Supp. IV 1992)).

7. The Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed by the Bankruptcy Reform Act of 1978, Pub. L. 95-598, Title I, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988 & Supp. IV 1992))).

8. See *In re Cottonwood Canyon Land Co.*, 146 B.R. 992, 997 (Bankr. D. Colo. 1992). In *In re Cottonwood*, a reorganized debtor objected to a proof of claim filed for \$55,000,000 for the cost of environmental cleanup. *Id.* at 993-94. In holding that its claim was discharged in the bankruptcy, the bankruptcy court rejected the claimant's position that environmental claims were unique and should be treated differently under the Bankruptcy Code. *Id.* at 997. The claimant had argued that the debtor "[sought] to ignore the unique status of environmental claims The fact is that environmental claims are unique because they do not exist at all until the government determines that certain hazardous waste sites pose a danger to the environment." *Id.* (quoting claimant's Reply Memorandum). The court noted that the primary problem with this argument was that "the Bankruptcy Code does not have a separate category or classification for 'unique claims.'" *Id.* See also James K. McBain, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 258-61 (1992) (proposing governmental unit priority in Bankruptcy Code to address environmental claims). See generally Gary E. Claar, *The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims*, 18 WM. MITCHELL L. REV. 29 (1992).

9. See generally Thomas G. Gruenert, *Environmental Claims in Bankruptcy: Policy Conflicts, Procedural Pitfalls and Problematic Precedent*, 32 S. TEX. L.J. 399 (1991); Philippe J. Kahn, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 CARDOZO L. REV. 1999 (1993); McBain, *supra* note 8; Thomas J. Salerno et al., *Environmental Law and Its Impact on Bankruptcy Law - Saga of "Toxins-R-Us"*, 25 REAL PROP., PROB. AND TR. J. 262 (1990); Katherine Simpson Allen, Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 VAND. L. REV. 1037 (1985); Jill Thompson Losch, Comment, *Bankruptcy v. Environmental Obligations: Clash of the Titans*, 52 LA. L. REV. 137 (1991); Kevin J. Saville,

triumphs at the expense of the other. However, when such important policy goals are at stake, this is an unsatisfactory solution.

A recent decision of the United States Court of Appeals for the Seventh Circuit highlights the inadequacy of this solution. In *In re CMC Heartland Partners*,¹⁰ the Seventh Circuit held that CMC Heartland Partners ("CMC"), the reincarnation of the bankrupt Chicago, Milwaukee, St. Paul, and Pacific Railroad, was liable under CERCLA for cleanup of hazardous waste deposited during the Railroad's ownership of the land in question.¹¹ The court found CMC liable notwithstanding EPA's failure to bring an action under CERCLA until four years after the close of bankruptcy proceedings.¹² The court agreed with CMC that EPA's failure to file a claim in the bankruptcy proceedings discharged CMC's liability as an operator or manager of the site.¹³ Notwithstanding, the court upheld CMC's liability as current owner of the site.¹⁴ It refused to enforce the injunction contained in the bankruptcy consummation order barring future claims against the reorganized debtor.¹⁵ In *CMC Heartland Partners*, CERCLA goals clearly triumphed over those of bankruptcy law.¹⁶

This Note focuses on the conflict arising when a debtor seeks to have CERCLA claims discharged, and the new dimension added to the conflict by the Seventh Circuit's decision in *CMC Heartland Partners*. This Note begins with a summary of the statutory schemes and policies behind CERCLA and bankruptcy law. It then discusses certain conflicts arising from their interaction—how the courts have balanced the competing policies in the past and how the Sev-

Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327 (1991).

10. 966 F.2d 1143 (7th Cir. 1992).

11. *Id.* at 1146. For a detailed discussion of *CMC Heartland Partners*, see *infra* notes 104-53 and accompanying text.

12. *CMC Heartland Partners*, 966 F.2d at 1147. The record demonstrated that EPA was aware of the hazard posed by the site at least five years prior to commencement of the bankruptcy proceedings. *Id.*

13. *Id.* at 1146.

14. *Id.* For a discussion of the CERCLA liability scheme, see *infra* notes 29-35 and accompanying text.

15. *Id.* at 1147.

16. In contrast, the Seventh Circuit held in *In re Chicago, Milwaukee, St. Paul & Pacific R.R.* that the same bankruptcy consummation order did bar a state environmental agency from bringing a cost recovery action under CERCLA to reimburse the state for its cleanup of a hazardous waste site which the reorganized debtor did not own. 974 F.2d 775 (7th Cir. 1992). In that case the bankruptcy laws relieving a debtor of liability trumped CERCLA provisions imposing liability. For a discussion of *Chicago, Milwaukee*, see *infra* note 85.

enth Circuit's recent decision in *CMC Heartland Partners* furthers the goals of CERCLA over those of the bankruptcy laws.

II. BACKGROUND

A. Statutory Background

1. *The Comprehensive Environmental Response, Compensation, and Liability Act of 1980*

In 1979, just prior to enactment of CERCLA, EPA identified over 2000 hazardous waste sites around the country which posed a threat to the public health or environment.¹⁷ In response to this growing threat, Congress pushed through a hastily drafted CERCLA in the twilight of the 96th Congress.¹⁸

The CERCLA statutory scheme is aimed at expediting the cleanup of hazardous waste sites and making responsible parties pay for the cleanup.¹⁹ CERCLA requires the President to establish and maintain a National Contingency Plan ("NCP")²⁰ which sets forth criteria for identifying hazardous waste sites and further specifies the procedures EPA must follow in taking action to clean up the site.²¹ The NCP includes the establishment of a National Priori-

17. *CERCLA Legislative History*, *supra* note 2, at 147. Recent estimates of existing hazardous waste sites in the United States range from 130,000 to 425,000. *Industry Compliance with Environmental Law*, BUS. DATELINE, July 19, 1993, at 13.

18. BRADFORD F. WHITMAN, *SUPERFUND LAW AND PRACTICE* 13 (1991). The last-minute legislation has been severely criticized since its enactment. "Caught in the contradictory winds of environmental anxiety, Reagan conservatism and populist tax revolt, the program was already a political orphan—doomed to founder in political squabbles, corporate hostility and staggering attorneys' fees. When the bargaining ended . . . the hazardous-waste bill had been watered down beyond recognition." Frank Viviano, *How Superfund Became a Mess; at a 1980 Meeting on Capitol Hill, It Took A Wrong Turn*, SAN FRANCISCO CHRON., May 30, 1991, at A1.

19. The goals of CERCLA have been summarized as follows:

1. To establish a comprehensive federal-state mechanism for rapid response to releases or threatened releases into the environment of hazardous substances at facilities that, in many instances, are not owned or operated by persons financially capable or willing to undertake appropriate response action. 2. To establish a federal trust fund, financed largely by private industry, to pay the costs of response action by federal or state agencies and private "volunteers," and to pay the costs of assessing the injury to and restoring natural resources and of restoring them under the trusteeship of the federal and state governments. 3. To establish a federal cause of action for recovery of costs incurred for responses to hazardous substance releases from four categories of persons: current owners and operators, owners and operators at the time of disposal, generators of the substances, and transporters of the substances.

WHITMAN, *supra* note 18, at 14.

20. See CERCLA., § 105(a), 42 U.S.C. § 9605(a).

21. The NCP sets priorities for cleaning up hazardous waste sites. Any and all government response actions, imposition of liability, and Superfund expenditures

ties List ("NPL") which identifies those hazardous waste sites throughout the country that pose the greatest risk to the public health or the environment.²² These sites are evaluated under the Hazardous Ranking System ("HRS").²³ If a site scores a certain level in an HRS evaluation, it is then listed on the NPL.²⁴ This listing must reflect the severity of risk of contamination to human health or the environment.²⁵

Once a site is placed on the NPL,²⁶ the government can take whatever steps are necessary and consistent with the NCP to respond to actual or threatened dangers.²⁷ The federal government finances cleanups through the "Superfund" established under CERCLA.²⁸ If the government draws on Superfund to clean up a site, it

must be consistent with the NCP. CERCLA § 105(a), 42 U.S.C. § 9605(a). See *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1512 (10th Cir. 1991); *Gen. Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 344 (D. Md. 1993).

22. CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B). The primary goal of establishing the NPL is to apprise the States and the public of the existence and location of hazardous waste sites that warrant remedial action. *Anne Arundel County v. EPA*, 963 F.2d 412, 413 (D.C. Cir. 1992). As of July 1993, the NPL listed approximately 1200 sites across the country. *EPA Hearings*, *supra* note 4. A property's inclusion on the NPL, by itself, has no legal effect on the owner's liability. Realistically, however, placement on the list has serious repercussions for the owner of the property; the specter raised by placement of a site on the NPL virtually always reduces value of such property on the open market. See *Kent County v. EPA*, 963 F.2d 391, 394 (D.C. Cir. 1992) ("[EPA] must remain aware that placement on the NPL has serious consequences for a site's owner.") (citing *B & B Tritech, Inc. v. EPA*, 957 F.2d 882, 885 (D.C. Cir. 1992); *SCA Serv. of Ind. v. Thomas*, 634 F. Supp. 1355, 1361-65 (N.D. Ind. 1986)).

23. The criteria used in the HRS are set forth at 40 C.F.R. 300 App. A (1992). These regulations represent a comprehensive system for evaluating the threat posed by the hazardous substances.

24. *Id.* There are also several other circumstances which may result in EPA placing a site on the NPL. For instance, a site which a state designates as its most threatening to the public health or the environment may be included on the NPL. 40 C.F.R. § 300.425(c)(2). In addition, if the Agency for Toxic Substances and Disease Registry advises that the public should be isolated from a release or if EPA concludes that a release is a significant threat to public health, then that site may be placed on the NPL. *Id.* § 300.425(c)(3).

25. CERCLA § 105(a)(8)(A), 42 U.S.C. § 9605(a)(8)(A).

26. Listing on the NPL does not affect liability under CERCLA. CERCLA § 105(8)(b), 42 U.S.C. § 9605(8)(b). See *Kent County*, 963 F.2d at 394 ("[L]isting on the NPL does not require any action by any party, and does not determine any party's liability for the cost of cleanup at the site.").

27. CERCLA § 104(a), 42 U.S.C. § 9604(a). The statute defines "respond" or "response" as: "[meaning] remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." *Id.* § 101(25), 42 U.S.C. § 9601(25).

28. When it was originally enacted, CERCLA established the Hazardous Substance Response Trust Fund to pay for governmental cleanup of hazardous waste sites. CERCLA § 131, 42 U.S.C. § 9631 (repealed 1986). At that time, the fund

may recover those costs from a potentially responsible party ("PRP") identified under section 107(a).²⁹ Under that section, liability extends to four categories of PRPs: past and present owners and operators of hazardous waste sites,³⁰ and transporters³¹ and generators³² of hazardous wastes. Because CERCLA is a remedial statute, the courts interpret these categories of liability broadly to best effectuate the statute's goals.³³ A PRP is liable for any and all

dedicated \$1.6 billion for cleanup during its first five years. WHITMAN, *supra* note 18, at 257-62. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act ("SARA"). Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending scattered sections of 42 U.S.C. §§ 9601-9675).

Section 111 of CERCLA appropriates not more than \$8.5 billion of the Superfund for government cleanups for a five year period starting October 17, 1986 and an additional sum of not more than \$5.1 billion for the period from October 1, 1991 through the end of September 1994. CERCLA § 111, 42 U.S.C. § 9611 (1988 & Supp. III 1991).

Section 104(a) dictates when the president can take removal or remedial action financed by Superfund.

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the . . . environment.

CERCLA § 104(a), 42 U.S.C. § 9604(a).

29. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).

30. CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). The statutory language in § 107(a) is "owner *and* operator"; however, liability is imposed as if it read "owner *or* operator." See, e.g., *Nurad, Inc. v. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992) ("Responsible persons include the current 'owner' *or* 'operator' of the facility.") (emphasis added), *cert. denied*, 113 S. Ct. 377 (1992); *Broderick Investment Co. v. Hartford Accident & Indem. Co.*, 954 F.2d 601, 604 n.2 (10th Cir. 1992) ("CERCLA identifies the owner *or* operator of a facility as a party potentially responsible for environmental response costs associated with the cleanup of the facility.") (emphasis added), *cert. denied*, 113 S. Ct. 189 (1992); *Hercules Inc. v. EPA*, 938 F.2d 276, 278 (D.C. Cir. 1991) ("CERCLA identifies four categories of responsible parties subject to liability, including current owners *or* operators of facilities containing hazardous substances and owners *or* operators at the time of disposal.") (emphasis added). Thus, as applied, CERCLA reaches a broader category of PRPs than it might have if CERCLA liability was imposed only on PRPs who were both owners and operators.

31. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

32. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). Under this provision, generator liability is imposed when a PRP "(1) disposed of its hazardous substances (2) at a facility which now contains hazardous substances of the sort disposed of by the generator (3) if there is a release of that or some other type of hazardous substance (4) which causes the incurrence of response costs." *United States v. Wade*, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983).

33. See, e.g., *Maryland Bank & Trust*, 632 F. Supp. 573, 578 (D. Md. 1986) (finding bank that held mortgage to hazardous waste site liable under CERCLA

response costs incurred in cleaning up the site.³⁴ Additionally, the PRP is liable for any damages to the environment and the costs of any health assessment studies prompted by the contamination.³⁵

notwithstanding that wastes were dumped prior to bank's taking possession of site). See also *Nurad*, 966 F.2d 837, 844 (4th Cir. 1992) (finding that clear language of CERCLA made prior owner of hazardous waste site liable for "disposal" of hazardous waste when passive migration of hazardous waste occurred during ownership, notwithstanding that prior owner had not actively disposed of any hazardous substances). But see *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1351 (N.D. Ill. 1992) (rejecting *Nurad* court's inclusion of passive migration in statutory definition of "disposal").

34. CERCLA § 107(a)(4)(A)-(B), 42 U.S.C. § 9607(a)(4)(A)-(B). "Response" actions include both removal and remedial action. Under CERCLA, removal action includes:

the cleanup or removal of released hazardous substances from the environment, such as may be necessary taken [sic] in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Id. § 101(23), 42 U.S.C. § 9601(23). Removal action is a short-term fix designed to remove an immediate threat. Remedial action is aimed at permanent cleanup of a site. Remedial action is defined in CERCLA as:

[t]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id. § 101(24), 42 U.S.C. § 9601(24).

35. CERCLA § 107(a)(4)(C)-(D), 42 U.S.C. § 9607(a)(4)(C)-(D). Furthermore, although the statute does not specifically provide for it, courts agree that Congress intended CERCLA to impose joint and several liability on PRPs. *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); see also, *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Bliss*, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987). This approach to CERCLA liability is consistent with the goal of the statute: privately funded remediation. However, it can result in extreme and sometimes unjust hardship. As noted in *Picillo*:

[H]olding defendants jointly and severally liable in such situations may often result in defendants paying for more than their fair share of harm. Nevertheless, courts have continued to impose joint and several liability on a regular basis, reasoning that where all of the contributing causes cannot be fairly traced, Congress intended for those proven at least partially culpable to bear the cost of uncertainty.

Picillo, 838 F.2d at 138 (citations omitted).

As further noted in *Picillo*, the severity of joint and several liability was tempered by provisions added in the SARA amendments. *Id.* at 179. Section 122(g) now allows for de minimis settlements by parties who are actually responsible for only a small amount of the contamination. See CERCLA § 122(g), 42 U.S.C. § 9622(g). In addition, the SARA amendments provide that a PRP found jointly and severally liable can sue another PRP for contribution if the harm is divisible. See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

As an alternative to EPA undertaking cleanup action itself and later seeking to recover those costs, EPA can compel the PRP to clean up the site. Section 106(a) of CERCLA authorizes the President to issue an order enforceable in federal court directing a PRP to undertake cleanup measures.³⁶ The President may invoke this authority when it is determined that a site poses an "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility. . . ."³⁷ Alternatively, under section

36. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). See, e.g., *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112-14 (D. Minn. 1982) (explaining conditions under which President, through EPA, may order PRP to clean up site). After complying with the 106(a) order, the liable party may petition the President for reimbursement for costs of cleanup when the party can "establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) . . . and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order." CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C). A party may also recover costs expended "to the extent that [the party] can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." *Id.* § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D). If, upon review, the court determines that the government's actions have been arbitrary and capricious, "the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan." *Id.* § 113(i), 42 U.S.C. § 9613(j)(3). Penalties for failure to comply with the order or injunction may be imposed pursuant to an enforcement action taken by EPA. *Id.* § 106(b)(1), 42 U.S.C. § 9606(b)(1). Section 106(a) does not provide an independent basis for liability; therefore, courts have imposed § 106(a) liability pursuant to § 107(a). See, e.g., *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 184 (W.D. Mo. 1985) (applying liability as defined by § 107(a) to a § 106(a) action).

37. CERCLA § 106(a), 42 U.S.C. § 9606(a). An EPA order issued pursuant to § 106 may include any of the following:

1. A statement identifying the "imminent and substantial" danger EPA believes exists and a description of the harm posed in the absence of removal or remedial action;
2. A statement of the authority of the issuing official . . . to issue the order;
3. A statement explaining why the recipient is liable under CERCLA;
4. The actions the recipient of the order must take to comply with the order;
5. A mandatory timetable for performing and completing those actions;
6. A provision informing the recipient that the duty to comply with the terms of the order takes effect 72 hours after the receipt of the order;
7. A provision informing the recipient that one of the subject's representatives may orally contact the agency to request a conference concerning the order and that any such request must be confirmed in writing;
8. A provision specifying a date by which inquiries regarding the order, whether made orally or in writing, must be received;
9. A provision stating that EPA reserves the right to take action if emergency circumstances so require and that such an emergency action would in no way relieve the parties of responsibility for the costs of the action;
10. A provision that requires (a) adequate chain-of-custody procedures with regard to any required testing and sampling, (b) adequate recordkeeping of activities (so that records may be used as evidence in any future enforcement case), (c) cooperation from employees of any contractor who engages in site activ-

106(a), EPA can ask the Attorney General "to secure such relief as may be necessary to abate such danger or threat, and the district court . . . shall have jurisdiction to grant such relief as the public interest and the equities of the case may require."³⁸ Under this provision, EPA may seek an injunction directed at abating an "imminent and substantial" threat.³⁹

In order to respond immediately to the danger posed by a release or threat of release, judicial review of remedial measures demanded by EPA is precluded until after the threat is removed.⁴⁰ Under section 113(h) of CERCLA, no review of an administrative order issued pursuant to section 106(a) is available unless the government takes enforcement action.⁴¹ In addition, no pre-enforce-

ity, and (d) availability of these employees to the Government in preparation and trial of a subsequent enforcement case.

WHITMAN, *supra* note 18, at 100-01 (citing Lee M. Thomas, EPA Assistant Administrator, EPA Guidance Memorandum to Regional Administrators on the Issue of Administrative Orders for Immediate Removal Actions 1 (Feb. 21, 1984)) (footnote omitted).

The courts have interpreted "imminent and substantial" to encompass conditions beyond emergency situations. *See, e.g.*, B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 96 (D. Conn. 1988). The harm need not be imminent in order to take action under § 106(a); the mere *threat* of imminent harm is sufficient. *See* United States v. Conservation Chem. Co., 619 F. Supp. at 192 (finding threat of harm sufficient to present "imminent and substantial endangerment"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. at 1109-10 (comparing CERCLA language to language of Safe Drinking Water Act requiring that merely risk of harm, not actual harm, be "imminent").

38. CERCLA § 106(a), 42 U.S.C. § 9606(a).

39. *See, e.g.*, United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990); Solid State Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987); B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89 (D. Conn. 1988); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982).

An injunction issued pursuant to § 106(a), however, is not the equivalent of a common law injunction. No showing of irreparable harm is necessary; merely the risk of harm must be proven. *B.F. Goodrich Co.*, 697 F. Supp. at 97. Nevertheless, the court must evaluate the situation in light of the other common law requirements of an injunction. *Id.* "It is appropriate . . . to consider such traditional equitable concerns as the availability of an adequate remedy at law; the possibility of harm to the non-moving party if relief is granted; the likelihood of success on the merits; and the public interest." *Id.*

40. *See* CERCLA § 113(h), 42 U.S.C. § 9613(h). The purpose of this provision is to expedite cleanup measures in the face of an imminent threat and delay any litigation until after the problem has been resolved and the threat removed. *Reardon v. United States*, 947 F.2d 1509, 1513 (1st Cir. 1991).

41. CERCLA § 113(h), 42 U.S.C. § 9613(h). The enforcement actions that trigger the availability of judicial review under § 113(h) include:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution. (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order. (3) An action for reimbursement under section 9606(b)(2) of this title. (4) An action under section 9659 of this title . . . alleging that

ment review of EPA prescribed removal or remedial actions pursuant to section 104 is available; the PRP must wait until completion of the cleanup to have the EPA plan reviewed.⁴² By delaying review of issues of liability or the propriety of the government order, the danger posed by a release or threat of release can be removed immediately and the liability issues decided after the threat to the public welfare or environment has abated.⁴³

Under the statutory framework described above, EPA has the tools necessary to promote congressional intent to remove health and environmental hazards and to hold those liable for creating a hazard responsible for its removal. However, as discussed in sections III and IV, when a PRP enters bankruptcy there are several road blocks to achieving the pure goals of CERCLA.

2. *The Bankruptcy Laws*

Bankruptcy law has two underlying policies which have historically directed its application: (1) to provide the debtor with a "fresh start" and (2) to provide a mechanism and a forum by which creditors can equitably sort out their claims to the debtor's estate.⁴⁴ When a debtor files a petition for bankruptcy the debtor may liquidate, usually under Chapter 7 of the Code, or reorganize, usually under Chapter 11.⁴⁵ In both cases, after the bankruptcy petition is

the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site. (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

Id. See also *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1387 (5th Cir. 1989) ("[C]ourts have consistently held that where judicial review will delay remedial and removal clean up activities, they are barred from reviewing response actions prior to an attempt by the EPA to enforce its orders or allegations of liability."); *In re National Gypsum Co.*, 139 B.R. 397, 411 (N.D. Tex. 1992) (challenging liability is equivalent to challenging EPA response actions).

42. CERCLA § 113(h), 42 U.S.C. § 9613(h).

43. See H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 267, *reprinted in* 1986 U.S.C.A.N. 2941.

44. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW*, 4 (1986); *Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("[The United States Supreme Court] has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934))).

45. Liquidation is the most common type of bankruptcy, accomplished under Chapter 7 of the Bankruptcy Code. BENJAMIN WEINTRAUB & ALAN N. RESNICK, *BANKRUPTCY LAW MANUAL* 1-2 (1980). Anyone may file under Chapter 7 who is not a railroad, insurance company, bank, savings bank, cooperative bank, savings and

filed, the Code imposes an automatic stay on pre-petition claims.⁴⁶ The automatic stay provides fundamental protection for the debtor.⁴⁷ It protects the debtor by barring any claims arising from judicial, administrative, or certain other statutorily specified action which could have been enforced pre-petition.⁴⁸

The discharge provisions of the Code also protect debtors. In a Chapter 7 liquidation, the purpose of discharging claims is to re-

loan association, bank and loan association, homestead association, or credit union. 11 U.S.C. § 109(b)(1)-(3) (1988). A corporation may file under Chapter 7, but it will not have its debts discharged. 11 U.S.C. § 727(a)(1). A corporation, however, may file a bankruptcy plan under Chapter 7 in order to liquidate its assets and distribute their value amongst its creditors. WEINTRAUB & RESNICK, *supra*, at 1-11.

Unlike liquidation, reorganization under Chapter 11 allows a debtor to continue operating a business.

A basic assumption that underlies American bankruptcy law is that it is often preferable to encourage and facilitate rehabilitation of businesses in financial trouble instead of providing for liquidation only. From a broad perspective, rehabilitation is better for the economy because it minimizes unemployment and waste of business assets. It is much more productive to use assets in the industry for which they were designed instead of selling them as distressed merchandise at liquidation sales. Also, rehabilitating a business is in the best long-term interest of creditors and shareholders.

Id.

In a Chapter 11 reorganization, a reorganization plan is developed which is designed to pay creditors out of the estate, but also to maintain profit-generating assets in order to allow the debtor to continue as an ongoing business. A reorganizing debtor is required to meet with its creditors. The court must appoint a committee of creditors to represent all unsecured creditors. 11 U.S.C. § 1102(a)(1). This committee has certain rights and duties. *Id.* § 1103. Among these rights is the right to participate in formation of a reorganization plan. *Id.* § 1103(c)(3). A plan may only be confirmed if, *inter alia*, "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." *Id.* § 1129(a)(11). The intention underlying this requirement is to ensure that only plans which are feasible are confirmed. WEINTRAUB & RESNICK, *supra* note 45, at 8-108. Furthermore, any payment to be fixed after confirmation of the plan must be approved by the presiding bankruptcy court as reasonable. 11 U.S.C. § 1129(a)(4). If the payments to be made are not reasonable, the plan cannot be confirmed.

46. 11 U.S.C. § 362. The Code defines a "claim" as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.]

11 U.S.C. § 101(4). Under both the former Bankruptcy Act and the current Code, the courts have interpreted "claim" broadly to effectuate the purpose of bankruptcy and maximize relief to the debtor.

47. MARTIN J. BIENENSTOCK, *BANKRUPTCY Reorganization* 7 (1987).

48. 11 U.S.C. § 362(a)(1)-(8) (1988).

lieve the individual debtor from any personal liability.⁴⁹ Although not available to corporations under Chapter 7, discharge of claims is available to corporations in a Chapter 11 reorganization proceeding.⁵⁰ Once a reorganization plan is submitted and confirmed, certain claims arising prior to confirmation are discharged.⁵¹ The debtor remains fully liable, however, for all claims arising after Chapter 7 liquidation or confirmation of a Chapter 11 reorganization plan.

The Code also provides for abandonment of property under certain circumstances. During bankruptcy, a trustee may abandon any property that is "burdensome" or of "inconsequential value" to the estate.⁵² Under the abandonment provision, the trustee may abandon property to any party with a possessory interest in that property.⁵³ Property which is abandoned is no longer part of the bankruptcy estate; instead, ownership reverts back to the debtor as if there had been no bankruptcy petition filed.⁵⁴ There are limits, however, to when a debtor can abandon property. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, the Supreme Court held that a trustee may not abandon property in violation of a state law "reasonably designed to protect the public health and safety from identified hazards."⁵⁵

49. See 11 U.S.C. § 727. Section 727(a) lists several exceptions to the dischargeability of claims in a Chapter 7 liquidation. In addition, § 523 of the Code lists exceptions applicable to discharge under both Chapters 7 and 11.

50. See 11 U.S.C. § 1141.

51. *Id.* § 1141(d). In light of the "fresh start" policy of bankruptcy law, courts have leaned towards a liberal construction of discharge provisions under both the current Bankruptcy Code and the Bankruptcy Act of 1898. See, e.g., *In re Pioch*, 235 F.2d 903, 905 (3d Cir. 1956); *In re Langer*, 12 B.R. 957, 960 (D.N.D. 1981) (citing *In re Jones*, 490 F.2d 452, 456 (5th Cir. 1974)). Under Chapter 11, plan confirmation will not discharge the debtor's obligations if:

(A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under Chapter 7 of [the Code].

11 U.S.C. § 1141(d)(3)(A)-(C).

52. 11 U.S.C. § 554(a).

53. *Id.*

54. *In re McGowen*, 95 B.R. 104, 106 (Bankr. N.D. Iowa 1988).

55. 474 U.S. 494, 507 (1986). The issue in *Midlantic* was whether, under § 554(a), a trustee could abandon property which did not comply with state laws or regulations intended to protect the public health or safety. *Id.* at 496. In that case, the debtor, Quanta Resources Corp. ("Quanta"), processed waste oil at two sites in New York and New Jersey, under a permit issued by the New Jersey Department of Environmental Protection ("NJDEP"). *Id.* at 497. When NJDEP discovered that Quanta had violated a condition in the permit, NJDEP ordered Quanta to cease processing. *Id.* Subsequently, NJDEP and Quanta began to negotiate funding a cleanup of the New Jersey site. *Id.* Before settlement was reached, however,

In addition to giving the debtor a fresh start, bankruptcy law is also aimed at protecting creditors' rights to an equitable distribution of the estate.⁵⁶ Adequate notice of the bankruptcy must be given to all creditors and equity security holders having a claim against the debtor's estate.⁵⁷ Distribution of the assets of a debtor's estate will depend on the type of claim asserted by the creditor. Under the Code, there are five categories of claims. In order of

Quanta filed for bankruptcy under Chapter 11. *Id.* Immediately thereafter, NJDEP issued an administrative order to Quanta requiring Quanta to take action to clean up the site. *Id.* Within a month of that order, Quanta converted its Chapter 11 reorganization into a Chapter 7 liquidation. *Id.*

At the time of the bankruptcy, the mortgage on the New York site exceeded the value of the property, and the trustee notified all parties of his intent to abandon the property. *Id.* The trustee alleged that the property was a burden to the debtor's estate. *Id.* In response, the city and state of New York objected to abandonment of the site because it posed a threat to the public health and safety. *Id.* at 498. They based their argument in part on § 959(b) of the Code which requires a trustee in bankruptcy to maintain property in compliance with applicable state laws. *Id.* The Bankruptcy Court, affirmed by the District Court for the District of New Jersey, allowed the abandonment and both actions were appealed to the Third Circuit, which reversed. *Id.*

The Supreme Court affirmed the Third Circuit's decision, holding that a "trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Id.* at 507. Although the Code codified the judicially developed doctrine of abandonment without specifying that a trustee could not abandon property in violation of state and federal laws, the Court found that in enacting § 559, Congress intended the provision to include that common law limitation. *Id.* at 501. The Court looked to Congress's repeated affirmation of its "goal of protecting the environment against toxic pollution" to support its conclusion. *Id.* at 505 (quoting *Chemical Mfrs. Ass'n v. National Resources Defense Council, Inc.*, 470 U.S. 116, 143 (1985)).

56. A creditor is defined in the Code as "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . ." 11 U.S.C. § 101(10)(A).

57. 11 U.S.C. § 342(a). This notice provision is intended to give creditors a chance to protect their claims from discharge under the bankruptcy. *See Oppenheim, Appel, Dixon & Co. v. Bullock (In re Robintech, Inc.)*, 863 F.2d 393, 396 (5th Cir. 1989) ("A creditor's claim can be barred for untimeliness only upon a showing that [creditor] received reasonable notice."), *cert. denied*, 493 U.S. 811 (1988). Failure to give notice may result in a dischargeable claim surviving bankruptcy. *See, e.g., California Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 930 (9th Cir. 1993) ("[N]othing in the legislative history or the Code suggests that Congress intended to discharge a creditor's rights before the creditor knew or should have known that its rights existed.") (quoting Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise*, 76 MINN. L. REV. 327, 349 (1991)). *See also Sylvester Bros. Dev. Co. v. Burlington N. R.R.*, 133 B.R. 648, 653 (D. Minn. 1991) (stating insufficient notice of claim against PRP bars discharge of claim); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 837 (D. Minn. 1990) (holding debtor's failure to disclose potential CERCLA liability barred discharge).

priority, they are: secured claims,⁵⁸ administrative expenses,⁵⁹ priority claims, unsecured claims, and equity interests.⁶⁰ In both Chapter 7 and Chapter 11 proceedings, the distribution of a debtor's assets must be determined according to these priorities.⁶¹

Although the Code defines "claim" and sets forth the treatment of claims in a bankruptcy proceeding, the determination of exactly when a "claim" arises is often dependent on the underlying substantive law. However, when a CERCLA claim arises is not clear from a reading of the statute itself. This uncertainty has resulted in a conflict between the policy goals of CERCLA and the Bankruptcy Code. This conflict is explored below.

B. The Conflict

Since its enactment, myriad questions and conflicts have arisen as to how CERCLA should be implemented — who is liable and under what circumstances. One major area of conflict occurs "at the increasingly crowded 'intersection' between the discordant legislative approaches embodied in CERCLA and the Bankruptcy Code."⁶² CERCLA and the Code are complex and comprehensive statutes each with a strong legislative mandate. In order to effect the "fresh start" policy, Congress designed the bankruptcy laws to release a debtor from past liabilities and expedite the disposition of any claims against the debtor.⁶³ In contrast, CERCLA seeks to hold all responsible parties liable and specifically provides for delayed resolution of liability issues until after any hazard has been elimi-

58. A secured claim is secured to the extent of the value of the collateral. 11 U.S.C. § 506(a).

59. Administrative expenses include "the actual, necessary costs of preserving the estate" *Id.* § 503(b). Administrative expenses receive priority over all claims except secured claims. *Id.* § 507(a)(1).

60. See generally, *In re* Torwico Electronics, Inc., 131 B.R. 561 (Bankr. D.N.J. 1991) (outlining priority of claims under Bankruptcy Code).

61. *Id.* at 565.

62. *Juniper v. Development Group (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 921 (1st Cir. 1993) (quoting *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991)).

63. See, e.g., *Carter Day Indus., Inc. v. EPA (In re Combustion Equip. Ass'n)*, 838 F.2d 35, 37 (2d Cir. 1988) ("[T]he Bankruptcy Code often accelerates litigation by allowing a bankruptcy judge to estimate contingent liabilities"); *In re Chicago, Milwaukee, St. P. and Pac. R.R.*, 974 F.2d 775, 779 (7th Cir. 1992) ("[B]ankruptcy's goal of giving debtors a fresh start would be frustrated if creditors who failed to file timely claims tried to bring claims against a reorganized company after the close of bankruptcy."). By expediting the disposition of claims against a debtor, a bankruptcy court can more equitably distribute the assets of the debtor.

nated.⁶⁴ Unfortunately, the policies underlying these statutes conflict.⁶⁵ By ignoring this conflict, Congress has effectively charged the courts with reconciling these competing policies.

Much of the litigation involving a reorganizing debtor's CERCLA liability arises in the context of determining when a CERCLA or other environmental "claim" is dischargeable in bankruptcy.⁶⁶ Debtors seek to establish that a CERCLA claim arose pre-petition and is therefore discharged in bankruptcy. In contrast, the government frequently argues that no CERCLA claim existed pre-petition and therefore the claim was not discharged. To date, courts have not established a consistent standard; discharge or survival of a claim depends on the particular court's characterization of the claim.

A recent and controversial decision by the Court of Appeals for the Second Circuit attempted to establish a standard for making this determination. In *In re Chateaugay*,⁶⁷ the Second Circuit upheld a district court's ruling that EPA's claims for response costs were discharged regardless of when those costs were incurred, as long as the release or threatened release was pre-petition.⁶⁸ In *Chateaugay*, EPA became aware of contaminated sites owned by the debtor when the debtor informed EPA during its reorganization that it anticipated that *all* CERCLA claims arising from pre-petition conduct, including contingent claims, would be discharged in the bankruptcy proceedings.⁶⁹ The federal and New York state governments then sought a declaratory judgment affirming that response costs that EPA incurred post-confirmation were not dischargeable

64. See CERCLA § 113(h), 42 U.S.C. § 9613(h). For a discussion of the CERCLA provision staying judicial review of claims in favor of cleaning up hazardous waste, see *supra* notes 40-43 and accompanying text.

65. *Hemingway Transp.*, 993 F.2d at 921.

66. See Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327, 337-53 (1991) (summarizing different approaches used by courts to determine when CERCLA claim arises).

67. *United States v. LTV Corp.* (*In re Chateaugay Corp.*), 944 F.2d 997 (2d Cir. 1991).

68. *Id.* at 999.

69. *Id.* at 1000. On July 16, 1986, the debtor, LTV Corporation, filed for bankruptcy under Chapter 11. *Id.* at 999. On its schedule of liabilities, LTV listed 24 pages of "contingent" claims held by EPA and environmental regulators in every state and the District of Columbia. *Id.* These contingent claims included environmental liability stemming from LTV's pre-petition conduct for which EPA had not yet incurred any response costs. The schedule failed to provide any further details. *Id.* In response, EPA filed a \$32 million proof of claim which identified LTV as a PRP at 14 hazardous waste sites. *Id.* This \$32 million did not represent all of EPA's claims; EPA was still not certain of all possible sites for which LTV might be a PRP. *Id.*

because EPA had no pre-petition claim.⁷⁰ The court found that the statutory relationship between EPA as a creditor and LTV as the reorganizing debtor contemplated contingent claims and these claims therefore dischargeable.⁷¹ Furthermore, the court found that even though EPA did not yet know the location of all potential hazardous waste sites for which the debtor could be liable, these were contingent claims and were thus subject to discharge.⁷² The court rejected EPA's argument that the Code should be more narrowly construed as applied to CERCLA claims in order to promote environmental protection.⁷³ The court stated that if the Code creates barriers to environmental cleanup, then it is for Congress to change the Code; it is not for the courts to reinterpret the Code to promote other statutory goals.⁷⁴

70. *Id.* at 1000.

71. *Chateaugay*, 944 F.2d at 1005. The court specifically limited its holding to pre-petition releases or threatened releases of hazardous substances and avoided laying down a blanket rule that all claims arising from *any* pre-petition conduct were discharged. *Id.*

72. *Id.*

73. *Id.* at 1002. As noted by the court, EPA's argument is flawed and could, in other circumstances, be used against EPA. EPA argued that in the LTV reorganization, response costs not yet incurred should not be viewed as claims and, therefore, should not be discharged. *Id.* at 1005. However, if this argument is employed in a Chapter 7 case, then EPA would not have a claim until it incurred response costs, and would have no chance at any recovery against a liquidating debtor's assets. *Id.* at 1005. Furthermore, this approach might prohibit a debtor from reorganizing.

Indeed while EPA obviously prefers in this case to keep its CERCLA claim outside of bankruptcy so that it may present it, without reduction, against the reorganized company that it anticipates will emerge from bankruptcy, one may well speculate whether, if unincurred CERCLA response costs are not claims, some corporations facing substantial environmental claims will be able to reorganize at all.

Id.

74. *Chateaugay*, 944 F.2d at 1002. The court also addressed the issue of whether EPA's claims were administrative priorities. Determination of administrative expense priority classification for environmental obligations presents another much-litigated conflict between CERCLA and the bankruptcy laws. The primary issue is "[w]hether the obligation is deemed pre-petition and thus paid pursuant to classification as a general unsecured claim, or whether it is considered post-petition and thus entitled to administrative expense priority" Löscher, *supra* note 9, at 161. In *Chateaugay*, the lower court determined that for sites which LTV currently owned and from which there had been a pre-petition release or threatened release, and for which EPA had assessed post-petition cleanup costs, those costs qualified as administrative priorities under 11 U.S.C. § 503(b)(1)(A). *Id.* at 1009. At trial, the debtor and its unsecured creditors argued that this was "an unwarranted attempt to convert pre-petition contingent claims into priority claims by the simple expedient of liquidating them, i.e., incurring response costs and securing reimbursement." *Id.* EPA countered by arguing that satisfaction of these claims was necessary to preserve the estate because cleanup allowed the estate to comply with environmental laws. *Id.* The district court granted EPA's claims for administrative priority, relying on *Midlantic*, in which the Supreme Court held that a debtor could not abandon property in contravention of a state environmental law

The bankruptcy court in *In re National Gypsum Co.* qualified the *Chateaugay* approach.⁷⁵ The *National Gypsum* court agreed with *Chateaugay* to the extent that determining when a "claim" exists is a question of when the pre-petition conduct results in the release of hazardous substances, without consideration of when response costs were incurred.⁷⁶ However, the *National Gypsum* court then departed from the broad *Chateaugay* approach. The court pointed

which protected the public health and environment. *Id.* (citing *Midlantic*, 474 U.S. 494, 507 (1986)). For a discussion of *Midlantic*, see *supra* note 55. The district court reasoned that if a debtor could not abandon property which was in violation of environmental law and which posed a threat to the public health, then the costs for removing that threat were necessary costs of preserving the estate. *Id.* at 1010. The Second Circuit agreed:

[The debtor's] argument that EPA should not be able to obtain administrative priority for a contingent claim by liquidating it overlooks the fact that EPA is doing more than fixing the amount of its claim; it is acting, during administration of the estate, to remedy the ongoing effects of a release of hazardous substances.

Id. See also *In re Wall Tube & Metal Prod. Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987) (holding that response costs incurred by state in evaluating hazardous waste site qualified as administrative expense because compliance with state environmental laws and protection of the public was necessary to preserve estate); *In re Peerless Plating Co.*, 70 B.R. 943, 948-49 (Bankr. W.D. Mich. 1987) (holding that EPA's claim for response costs incurred against Chapter 7 debtor was administrative expense because trustee could not have avoided liability by abandoning property in violation of CERCLA and rejecting trustee's argument that EPA's claim should not be administrative expense because that would deplete estate as this is normal course of liquidation). The view taken by the *Chateaugay* court is the majority view. Losch, *supra* note 9, at 163. The minority view holds that cleanup obligations are not a necessary cost of preserving the estate. *Id.* (citing *In re Dant & Russell*, 853 F.2d 700 (9th Cir. 1988); *Southern Ry. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985)). For an in-depth discussion of this conflict, see Gruenert, *supra* note 9, at 431-39.

75. *In re National Gypsum Co.*, 139 B.R. 397 (N.D. Tex. 1992). The debtor, National Gypsum and its parent corporation, filed for bankruptcy under Chapter 11 in October 1990. *Id.* at 399. EPA filed a proof of claim asserting debtor liability under CERCLA for response costs already incurred, future response costs, and natural resource damages. *Id.* at 401-02. The proof of claim identified seven sites listed on the NPL and reserved EPA's right to charge the debtor as a PRP on at least 13 unlisted sites. *Id.* at 400.

EPA contended that neither future response costs for listed sites, nor debtor's liability at unlisted sites, were claims dischargeable in bankruptcy. *Id.* at 401. Instead, EPA argued that under bankruptcy law, the court should look to the underlying substantive law, CERCLA, to determine when a claim arises. *Id.* at 403. According to EPA, a claim did not arise under CERCLA "until costs have been expended or remedial measures adopted to address environmental hazards." *Id.* at 404.

76. *Id.* at 407. The *National Gypsum* court agreed with *Chateaugay* that reconciliation between the Code and CERCLA allowed for an estimation of contingent environmental liabilities as "claims" within the meaning of the Code, thus subjecting them to the possibility of discharge. *Id.* at 406. This estimation allows the court to make the determination of what status to give to potential CERCLA liabilities. *Id.* However, actual liquidation of the claim would await "normal CERCLA enforcement proceedings." *Id.* (citing *Chateaugay*, 944 F.2d at 1006).

out that although the Second Circuit purported to apply a contractual standard to determine when a CERCLA claim arises, the actual standard applied is far more broad.⁷⁷ The bankruptcy court said that this standard reached claims which could not have been "fairly contemplated."⁷⁸ Instead, the court in *National Gypsum* held that claims based on pre-petition conduct were dischargeable only if those claims could be "fairly contemplated."⁷⁹ This "fairly contemplated" standard may preserve CERCLA claims which could be discharged under the broad *Chateaugay* approach.⁸⁰

The bankruptcy court in *United States v. Union Scrap Iron & Metal*⁸¹ took an even more narrow approach than that in *National Gypsum*. In *Union Scrap*, the bankruptcy court stated that a CERCLA claim arises only when there is pre-petition release or threat of release of hazardous substances and cleanup costs are incurred.⁸² That court distinguished *Chateaugay* on the grounds that in *Chateaugay*, EPA was aware of potential claims during the bankruptcy proceedings, and, therefore, had the opportunity to pursue its claims, but failed to do so.⁸³ Conversely, in *Union Scrap*, EPA was not aware of the debtor's ownership of the site in question until four years after the closing of bankruptcy proceedings. EPA therefore could not have incurred any response costs representing a CERCLA claim at the time of the bankruptcy.⁸⁴ The court refused to force EPA to pursue a potential claim every time a potentially responsible party initiated bankruptcy proceedings.⁸⁵

77. *Id.* at 406-07.

78. *Id.*

79. *National Gypsum*, 139 B.R. at 406-07. The court suggested the following factors be considered in determining when a potential claim is fairly contemplated: "Knowledge by the parties of a site in which a PRP may be liable, NPL listing, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs." *Id.* at 408.

80. EPA argued that this approach would discourage EPA from filing a claim. *Id.* If contingent claims would be discharged when no response costs had been incurred, it would benefit EPA to sit on a claim through bankruptcy "waiting instead to pursue the recovery of costs only after they have been incurred in the ordinary course of its activities" *Id.* at 408 (quoting United States Motion for Legal Determination of Issues Raised in the Debtor's Objections, Motions and/or Counterclaims at 36). The court rejected this argument noting that, while CERCLA itself puts no time limits on EPA response, under bankruptcy law, EPA must file a claim merely upon discovery of a site. *Id.* at 409.

81. 123 B.R. 831 (D. Minn. 1990).

82. *Id.* at 835.

83. *Id.* at 836.

84. *Id.* at 834.

85. *Union Scrap Iron & Metal*, 123 B.R. at 837. ("Adopting [this] position would effectively require pre-enforcement CERCLA litigation by forcing the EPA to investigate and assess its potential CERCLA claims every time a conceivable po-

In a more recent case, the Ninth Circuit clarified the deficiencies in the *Chateaugay* approach and instead followed more closely the approach used in *National Gypsum*. In *In re Jensen*,⁸⁶ a corporation owned by appellees, the Jensons, had filed for bankruptcy under Chapter 11.⁸⁷ Two months later, the California Water

tentially responsible party filed for bankruptcy. This would reverse the CERCLA scheme and threaten the effectiveness of EPA action.”). Ironically, a similar approach was taken by the Second Circuit in *Carter Day Indus., Inc. v. EPA* (*In re Combustion Equip. Ass’n*), 838 F.2d 35, 40 (2d Cir. 1988). In *Combustion Equip.*, the Second Circuit refused to grant a debtor’s motion for declaratory judgement that any CERCLA claim arising from contamination at a site owned by debtor’s bankrupt subsidiary was discharged. *Id.* at 40-41. In that case, the only action taken by EPA was sending a letter informing the debtor of potential liability. *Id.* at 36. The court concluded that the issue was not ripe because EPA had taken no further action and a contrary holding would require EPA to spend its assets “preserving its claim” instead of cleaning up hazardous waste sites. *Id.* at 39-40.

In *In re Chicago, Milwaukee, St. P. & Pac. R.R.*, the Seventh Circuit addressed an issue similar to that involved in *Union Scrap*. 974 F.2d 775 (7th Cir. 1992). *Chicago, Milwaukee* concerned CMC Heartland Partners, the same reorganized debtor who is the subject of *In re CMC Heartland Partners*. In *Chicago, Milwaukee*, the court held that the injunction contained in bankruptcy consummation order barred the Washington State Department of Transportation (“WSDOT”) from bringing an action against CMC under CERCLA arising from a spill of hazardous substances which occurred when one of the Railroad’s trains derailed in 1979. *Chicago, Milwaukee*, 974 F.2d at 778.

The Chicago, Milwaukee Railroad had filed for bankruptcy in 1977 under the now repealed Bankruptcy Act. As the bankruptcy proceeding progressed, the bankruptcy court set a bar date of December 26, 1985. *Id.* at 780. In 1984, WSDOT purchased the site and subsequently incurred cleanup costs. *Id.* at 778. The record showed that the Washington State Department of Ecology (“WSDOE”) knew of the contamination by mid-July 1985; by November 26, 1985, tests confirmed that the site contained hazardous waste. *Id.* The district court, affirmed by the Seventh Circuit, found that WSDOT had a claim prior to the bar date and rejected WSDOT’s argument that the debtor failed to give sufficient notice. *Id.* at 778-79. Having failed to file a claim by the bar date, WSDOT’s claim was discharged. *Id.* at 779.

Relying on *Union Scrap*, WSDOT had argued that it did not have a claim dischargeable under Section 77 of the Bankruptcy Act (relating specifically to railroads) until it incurred response costs. *Id.* at 779. The Seventh Circuit disagreed. It found that because Section 77 contemplated contingent claims which had to be brought in order to preserve a claim, it was not necessary that actual response costs have been incurred before a claim accrued under Section 77. The court refused to lay down a rule requiring that actual response costs must be incurred before a claim exists under CERCLA. Instead, the court held:

When a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent claim for purposes of Section 77.

Id. at 786.

86. *California Dep’t of Health Servs. v. Jensen* (*In re Jensen*), 995 F.2d 925 (9th Cir. 1993) [hereinafter *Jensen*].

87. *Id.* at 926.

Board notified the Jensens that it had discovered tanks containing hazardous substances on the corporation's property. The Water Board requested they take immediate action to remove the threat posed by the hazardous substances.⁸⁸ The Jensens' attorney notified the Water Board that if forced to clean up, the corporation would liquidate under Chapter 7, instead of reorganizing under Chapter 11.⁸⁹ Ultimately, the Jensons did convert the bankruptcy to a liquidation with the Jensens also filing for personal bankruptcy under Chapter 7.⁹⁰ Two years after the closing of their bankruptcy, and after failed attempts to get the Jensens to clean the site, the California Department of Health Services ("DHS") undertook cleanup itself.⁹¹ In a subsequent action by DHS to recover costs, the bankruptcy court held that DHS's claim had arisen post-petition and was not discharged.⁹²

A bankruptcy panel of the Ninth Circuit overruled that decision, holding that the claim was discharged because it arose pre-petition.⁹³ The Ninth Circuit affirmed. The court rejected *Chateaugay's* broad approach and instead adopted the "fairly contemplated" standard of *National Gypsum*.⁹⁴ The court imputed the Water Board's knowledge to DHS and concluded "that the state had sufficient knowledge of the Jensens' potential liability to give rise to a contingent claim for cleanup costs before the Jensens filed their personal bankruptcy petition" ⁹⁵ Based on this, the court ruled that DHS's claim was discharged.⁹⁶

88. *Id.*

89. *Id.*

90. *Jensen*, 995 F.2d at 926.

91. *Id.* at 927.

92. *Id.* at 926 (citing *Jensen v. Bank of America, N.T. & S.A. (In re Jensen)* 114 B.R. 700, 707 (Bankr. E.D. Cal. 1990)).

93. *Jensen v. California Dep't of Health Servs. (In re Jensen)*, 127 B.R. 27, 33 (Bankr. 9th Cir. 1991)).

94. *Jensen*, 995 F.2d at 930-31.

95. *Id.* at 931.

96. The history of this case is a paradigm of the varying approaches taken to resolve the issue of when a CERCLA claim arises for purposes of bankruptcy. Initially, the issue was addressed by the Bankruptcy Court for the Eastern District of California in *Jensen v. Bank of America N.T. & S.A. (In re Jensen)*, 114 B.R. 700 (Bankr. E.D. Cal. 1990). In that case, the bankruptcy court held that the State's claim arose after cleanup costs were incurred and was not subject to discharge, notwithstanding that liability arose out of pre-petition conduct. The court stated that in determining when the claim arose, the only material fact was when cleanup costs had been incurred. *Id.* at 702. That court rejected decisions based on an analogy to mass tort law that a claim arises immediately upon the negligent conduct. *Id.* at 704. Instead, the court said that all the elements of a CERCLA or state environmental claim were not present until recoverable costs had been expended. *Id.*

A similar conflict arises in the context of when an injunction issued pursuant to environmental regulations constitutes a dischargeable claim. In the landmark decision of *Ohio v. Kovacs*,⁹⁷ the Supreme Court addressed the issue. In *Kovacs*, the Court held that when compliance with an injunction obligates the debtor to a money payment, the injunction amounts to a claim and is discharged.⁹⁸ However, what the Court did not hold is equally as important. In dicta, the Court stated that its decision did not question that a debtor or its successor-in-interest must comply with state environmental laws.⁹⁹ The effect of this decision is that an injunction

On appeal, a bankruptcy panel of the Ninth Circuit in *Jensen v. California Dep't of Health Servs.* (*In re Jensen*), 127 B.R. 27 (Bankr. 9th Cir. 1991), reversed. In its opinion, the bankruptcy panel reviewed three different approaches taken by the courts to determine when a CERCLA claim arises: the claim arises with the right to payment; the claim arises upon the establishment of the debtor-creditor relationship; and the claim arises based upon the debtor's conduct. *Id.* at 30-33. The appellate panel adopted the third approach, which was specifically rejected by the district court. The appellate panel stated that an analogy to mass tort cases "most closely reflects legislative intent and finds the most support in the case law." *Id.* at 32. As discussed *supra* notes 86-95, a full panel of the Ninth Circuit affirmed.

97. 469 U.S. 274 (1985).

98. *Id.* at 283. In *Kovacs*, defendant operator of a chemical waste business had been enjoined by a state court to cease dumping hazardous waste in Ohio waters. *Id.* at 276. The defendant failed to comply with the injunction. *Id.* Consequently, the state appointed a receiver to take charge of the defendant's assets and use them towards cleaning up the hazardous waste site. *Id.* The defendant then filed for bankruptcy, pursuant to which the State requested a declaration that any obligations under the injunction would not be discharged because they were not claims. *Id.* at 276-77. The Supreme Court affirmed the Sixth Circuit's decision upholding the district court ruling that the State's action against the defendant was a claim and that "Ohio essentially sought from Kovacs only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the bankruptcy statute." *Id.* at 277.

99. *Id.* at 285. The Supreme Court relied on this dicta in its decision in *Midlantic Nat'l Bank v. New Jersey Dep't Envtl. Protection*, 474 U.S. 494 (1986). For a discussion of *Midlantic*, see *supra* note 55 and accompanying text.

Although *Midlantic* was decided in the context of enforcement of a state environmental regulation, courts have widely applied the rule in bankruptcy cases involving CERCLA claims. See, e.g., *Borden, Inc. v. Wells-Fargo Bus. Credit* (*In re Smith-Douglass, Inc.*), 856 F.2d 12, 15-17 (4th Cir. 1988); *In re Peerless Plating Co.*, 70 B.R. 943, 946-47 (Bankr. W.D. Mich. 1987); *White v. Coon* (*In re Purco, Inc.*), 76 B.R. 523, 532-33 (Bankr. W.D. Pa. 1987); *In re Franklin Signal Corp.*, 65 B.R. 268, 271-74 (Bankr. D. Minn. 1986). *Midlantic*, however, limits the prohibition on abandonment to situations where violation of regulations pose a *definite* danger to public safety. In contrast, EPA can take enforcement action under CERCLA in cases where there is merely a *threat* to the public welfare or environment. Notwithstanding the "definite" standard in *Midlantic*, some of the lower courts have extended the *Midlantic* ruling to reach PRPs under CERCLA. In those cases, the mere threat of release would prevent the debtor from abandoning the property.

In *Peerless Plating*, the bankruptcy court held that a trustee could not abandon property which was not in *full compliance* with CERCLA. *Peerless Plating*, 70 B.R. at 947-48. In that case, the bankruptcy court noted that although EPA had presented only minimal evidence of an imminent threat it found the circumstances in the

that directs the owner of a site to comply with environmental regulations might not be a dischargeable claim.¹⁰⁰

In *Chateaugay*, the Second Circuit applied the *Kovacs* distinction between a "claim injunction" from a "non-claim injunction" to CERCLA liability. The court stated that a cleanup order issued pursuant to CERCLA is dischargeable to the extent that it allows a money payment to be made in place of undertaking cleanup obligations.¹⁰¹ Under this standard, if EPA orders a debtor to clean up a site that does not pose a threat of release of hazardous wastes, that order may be discharged if EPA could have taken cleanup action itself and later sued for reimbursement. On the other hand, if the order directs the debtor to cease polluting, the debtor cannot offer a money payment to continue polluting, therefore, the order does not constitute a "claim" and is not dischargeable.¹⁰² Although the court applied this standard, it acknowledged that "the line . . . could arguably be drawn somewhat differently, for example, by placing on the non-'claim' side only those injunctions ordering a defendant to stop current activities that add to pollution . . . while leaving on the 'claim' side all other injunctions. . . ."¹⁰³

case warranted its decision in light of Congress's intent in enacting CERCLA. *Id.* at 947.

A more narrow reading of *Midlantic* was applied by the Fourth Circuit in *Smith-Douglass*. In that case, the court upheld a district court ruling allowing a trustee to abandon property because the court found no *imminent threat* to the public even though the property was in violation of state environmental laws. *Smith-Douglass*, 856 F.2d at 16-17. See also *Purco, Inc.*, 76 B.R. at 533-34; *Franklin Signal Corp.*, 65 B.R. at 271-72.

100. See *In re Chateaugay*, 944 F.2d 997 (1992).

101. *Id.* at 1006-09. The court examined the analysis put forward by Professors Baird and Jackson in response to the Sixth Circuit's opinion in *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, 469 U.S. 274 (1985). Professors Baird and Jackson asserted that dischargeability should hinge on a distinction between the following two types of obligations:

[t]hose obligations of a debtor that result from activities engaged in before the filing of the petition and whose consequences *continue* to exist even if the debtor goes out of business or dies the moment that the bankruptcy petition is filed, and those obligations that arise because of the debtor's continued existence and that would disappear if the debtor were to cease operations or die.

Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1204 (1984). The *Chateaugay* court simplified this distinction and described it as one "between an injunction 'to cease polluting' (non-dischargeable) and an injunction 'to clean up toxic wastes that already have been deposited' (dischargeable)." *Chateaugay*, 944 F.2d at 1007. However, noting that most environmental injunctions involve enjoining a party from continuing to pollute as well as cleaning up existing pollution, the court rejected that distinction. *Id.* at 1007-08.

102. *Chateaugay*, 944 F.2d at 1008.

103. *Id.* at 1009.

As *Chateaugay* demonstrates, resolution of these issues is difficult. If EPA takes cleanup action itself to ameliorate ongoing pollution, a claim against a debtor for reimbursement may be discharged during bankruptcy, and the debtor free from that liability forever. However, if instead EPA orders the debtor to take action, the debtor may still be liable regardless of any bankruptcy proceedings past or present. This was the situation in *In re CMC Heartland Partners*.

III. *IN RE CMC HEARTLAND PARTNERS*

A. Factual and Procedural Background

CMC Heartland Partners is the reincarnation of the reorganized Chicago, Milwaukee, St. Paul and Pacific Railroad (the "Railroad").¹⁰⁴ In 1977, the Railroad filed a voluntary petition for bankruptcy under section 77 of the Bankruptcy Act of 1898 (the "Act").¹⁰⁵ The petition was assigned to a Reorganization Court which established bar dates pursuant to the provisions of the Act.¹⁰⁶ On November 12, 1985, that court entered a Final Consummation Order,¹⁰⁷ which barred all actions against CMC, as the reorganized company, from obligations incurred by the Railroad.¹⁰⁸

104. Brief for Appellant at 4, *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992) (No. 91-3005) [hereinafter Appellant's Brief].

105. Appellant's Brief, *supra* note 104, at 5; 11 U.S.C. § 205 (repealed 1978).

106. The court set January 9, 1980 as the bar date for all pre-petition claims. Appellant's Brief, *supra* note 104, at 7. As the bankruptcy proceedings progressed, all parties to the reorganization negotiated a proposed reorganization plan. *Id.* at 6. On July 12, 1985, the Reorganization Court approved the proposed plan and issued a Confirmation Order. *Id.* at 7.

107. *Id.* at 7. The Final Consummation Order established a final date of November 25, 1985 at which time title of assets under the bankruptcy trustee's administration reverted back to the reorganized successor and no further claims could be asserted. *Id.* at 7-8.

108. The injunction provided:

All persons, firms, corporations and other entities, including without limitation the United States . . . are by this Order perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute, or pursue, any suit, action or proceeding ("Action") against the Reorganized Company (or its successors and assigns), or against any of the assets or property of the Reorganized Company (or of its successors and assigns) directly or indirectly, by reason of or on account of any obligation or obligations incurred by the Debtor or by the Trustee, except the obligations imposed upon or required to be assumed by the Reorganized Company by the Plan (including those claims filed pursuant to Section 11.1 of the Plan which are ultimately determined to be Allowable Claims) or this Order.

Id. at 8-9.

As successor to the Railroad, CMC retained ownership in a property known as Wheeler Pit.¹⁰⁹ In 1956, the Railroad had leased a portion of Wheeler Pit to General Motors ("GM").¹¹⁰ GM used the pit to dispose of hazardous wastes from its nearby manufacturing plant from 1960-1964.¹¹¹ In 1974, GM filled in the pit and today there are trees growing over the site.¹¹²

EPA was aware of the waste disposal at Wheeler Pit at least as early as 1972.¹¹³ In 1981, both GM and CMC informed EPA of the waste dumped at the site.¹¹⁴ In response, EPA performed hazardous waste testing on the site and in 1984 placed Wheeler Pit on the NPL.¹¹⁵

In September 1990, after completing an evaluation of the site, EPA conducted further testing and selected a final remedy for cleanup at the site.¹¹⁶ On May 6, 1991, EPA issued an administrative order to CMC and GM pursuant to section 106(a) of CERCLA,¹¹⁷ directing those parties to implement the remediation plan EPA had selected by May 13, 1991.¹¹⁸ In response to this order,

109. *In re CMC Heartland Partners*, 966 F.2d 1143, 1145 (7th Cir. 1992).

110. *Id.* General Motors was also liable under CERCLA for cleanup of the Wheeler Pit site. However, the court does not address the issue of General Motors' liability except to note that General Motors had an obligation for cleanup. *Id.* The government's administrative order, which is the subject of the appeal in *CMC Heartland Partners*, was also directed to General Motors. Appellant's Brief, *supra* note 104, at 12.

111. *CMC Heartland Partners*, 966 F.2d at 1145. General Motors "dumped paint spray sludge, residue from its part hanger stripping system, clarifier sludge and powerhouse coal ashes from its automobile assembly plant . . ." *In re Chicago, Milwaukee, St. P. & Pac. R.R.*, 130 B.R. 521, 522 (N.D. Ill. 1991).

112. *CMC Heartland Partners*, 966 F.2d at 1143.

113. Appellant's Brief, *supra* note 104, at 10. This was two years prior to GM's cessation of dumping, five years prior to commencement of bankruptcy proceedings, and approximately 19 years prior to EPA's CERCLA § 106(a) order. *Id.*

114. *Id.*

115. *Id.* at 11. EPA conducted an HRS evaluation of the site. *Id.* The site scored high enough under the HRS to warrant listing on the NPL. For a full discussion of the HRS and the NPL, see *supra* notes 21-25 and accompanying text. The HRS evaluation caused EPA to incur response costs as early as 1983. *Chicago, Milwaukee*, 130 B.R., at 522. Subsequently, EPA, CMC, and GM entered into an Administrative Order and Consent. Pursuant to that Order, CMC and GM performed a Remedial Investigation and Feasibility Study which EPA oversaw. *Id.* CMC and GM reimbursed EPA for its oversight costs. *Id.*

116. *Id.* EPA's selected remedy required "the consolidation of waste and soil from adjacent property onto the original disposal area, the construction of a compacted clay cover on the site and the monitoring and evaluation of groundwater to ensure the effectiveness of the remedial action." *Id.*

117. CERCLA § 106(a), 42 U.S.C. § 9606(a). For further discussion of § 106(a), see *supra* notes 36-41 and accompanying text.

118. Appellant's Brief, *supra* note 104, at 12. EPA asserted that "releases or threatened releases of hazardous substances at the Wheeler Pit site could present an imminent substantial endangerment to public health and the environment."

CMC went back to the Reorganization Court asserting that the injunction contained in the Final Consummation Order discharged CMC's liability as current owner of the Wheeler Pit site.¹¹⁹

The Reorganization Court rejected CMC's assertion, holding that the injunction did not bar EPA's section 106(a) order and CMC was therefore liable for the cleanup as the current owner.¹²⁰ On appeal, the Court of Appeals for the Seventh Circuit affirmed the Reorganization Court's decision.¹²¹ It held that although the waste was deposited during ownership by the Railroad, the injunction did not preclude EPA from issuing a section 106(a) order to the current owner, CMC.¹²² The court found CMC liable based on EPA's determination that the site currently posed an actual or threatened imminent danger to the public and the environment.¹²³

B. The Seventh Circuit's Analysis

The Seventh Circuit conceded that to the extent that sections 106 and 107 required monetary payment today for acts occurring before or during the bankruptcy,¹²⁴ under the former Bankruptcy Act, EPA had a "claim" under CERCLA.¹²⁵ The court reasoned that any "claim" against CMC as prior operator or manager was therefore discharged in the bankruptcy.¹²⁶ However, the court distinguished this "claim," from an action brought under section 106(a) in conjunction with section 107(a) liability against a current owner.¹²⁷ In that case, there was no discharge and CMC was liable

Chicago, Milwaukee, 130 B.R. at 522-23. Under the language of § 106(a), the President is authorized to order cleanup when he determines that a site poses this type of threat. Judicial review of this determination is delayed until after cleanup is completed. CERCLA § 113(h), 42 U.S.C. § 9613(h). See *supra* notes 40-42 and accompanying text.

119. *Chicago, Milwaukee*, 130 B.R. at 523. See *supra* note 108 for the text of the injunction.

120. *Id.* at 524. Without explanation, the court rejected CMC's attempt to analogize this case to several others relating to this bankruptcy in which the district court and the Seventh Circuit enforced the injunction and barred claims against CMC. *Id.* See, e.g., *In re Chicago, Milwaukee*, St. P. & Pac. R.R., 878 F.2d 182 (7th Cir. 1989) (enforcing injunction contained in Consummation Order to bar former employee from bringing claim after applicable bar date); *In re Chicago, Milwaukee*, St. P. & Pac. R.R., 112 B.R. 920 (N.D. Ill. 1990) (enforcing injunction to bar claim not filed by applicable bar date). The court merely stated that these cases did not bear on the outcome of CMC's motion. *Id.*

121. *In re CMC Heartland Partners*, 966 F.2d 1143, 1147 (7th Cir. 1992).

122. *Id.* at 1146.

123. *Id.* at 1147-48.

124. *Id.* at 1146.

125. *CMC Heartland Partners*, 966 F.2d at 1147.

126. *Id.*

127. *Id.* at 1146.

for the cleanup.¹²⁸ The court's analysis severs any connection between CMC as the reorganized debtor and CMC as the current owner of the Wheeler Pit site. The court analogized the survival of the CERCLA claim to a situation in which CMC, after reorganization, had sold the property to a third party.¹²⁹ That third party, having no protection from bankruptcy law, would be liable under CERCLA as the current owner.¹³⁰ In the same way, CMC, as the current owner, had no protection from any prior bankruptcy proceedings when there existed an imminent threat to the public or the environment.¹³¹

The court relied primarily on the Supreme Court's decision in *Kovacs*,¹³² in which the Court stated in dicta that anyone in possession of a site must comply with the environmental laws of the state.¹³³ In *CMC Heartland Partners*, EPA had determined that Wheeler Pit posed a threat of the kind contemplated by section 106(a), and under *Kovacs*, CMC, as current owner, must comply with CERCLA, regardless of the Reorganization Court's injunction.¹³⁴

The final issue addressed in the decision was CMC's liability in the case of an arbitrary or mistaken action by EPA in directing CMC to clean up. The court acknowledged EPA's obligation to prove that Wheeler Pit posed an imminent threat as contemplated by section 106(a), in order to sustain CMC's liability.¹³⁵ If EPA's findings were incorrect, CMC will be compensated for any costs expended in remediating the site. However, pursuant to section 113(h), that

128. *Id.*

129. *CMC Heartland Partners*, 966 F.2d at 1146-47.

130. *Id.* The court cited *Nurad, Inc. v. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 288 (1992). In that case, the Fourth Circuit reversed in part a district court ruling that CERCLA liability depended on proof of active participation in disposal of hazardous waste. *Nurad*, 966 F.2d at 840. The court held that § 107(a) imposed liability on a present owner of a site on which there was a release of hazardous substances, even though the present owner was not responsible for the disposal. *Id.* In addition, the court upheld the liability of past owners of the facility even though they had not been actively involved in the disposal which led to the release. *Id.* at 846.

131. *CMC Heartland Partners*, 966 F.2d at 1147.

132. 469 U.S. 274 (1985).

133. *Kovacs*, 469 U.S. at 285. For a discussion of *Kovacs*, see *supra* notes 97-100 and accompanying text.

134. *Id.* at 1146. The court analogized the survival of the CERCLA statutory obligation to security interests and other liens which survive bankruptcy. *Id.* at 1147. See, e.g., *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992) (holding that under Bankruptcy Act of 1898, lien on real property survived bankruptcy).

135. *CMC Heartland Partners*, 966 F.2d at 1147.

issue must wait until after cleanup or until EPA takes enforcement action.¹³⁶

C. Critical Analysis: Emergence of a New Conflict

Bankruptcy courts are courts in equity and can provide relief where a court at law cannot.¹³⁷ However, courts in equity are still bound by the limits of federal statutes.¹³⁸ In *CMC Heartland Partners*, the statutory confines of CERCLA limited the court's ability to provide an equitable solution. The decision poses a new question, unresolved by the statutes themselves, that arises when a PRP enters or is in bankruptcy: if EPA is subject to a statute of limitations on when it can recover from a PRP, should EPA similarly be subject to limitations on when it can force a PRP debtor to take cleanup action? Currently, there is no such limitation on EPA. Therefore, in the absence of any legislative mandate, the Seventh Circuit in *CMC Heartland Partners* held CMC, the current owner, liable for cleanup of Wheeler Pit, regardless of the fact that EPA knew that the hazardous waste at the site posed a threat to the public and the environment *nineteen years* prior to taking any action to remove that threat.¹³⁹

EPA's action against CMC for cleanup was brought pursuant to section 106(a) of CERCLA which authorizes EPA to issue an order

136. CERCLA § 113(h), 42 U.S.C. § 9613(h). For a discussion of § 113(h) see *supra* notes 40-42.

137. *United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1091 (6th Cir. 1990).

The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action in making any determination necessary or appropriate to enforce or implement court orders or rules to prevent an abuse of process.

11 U.S.C. § 105(a).

138. See, e.g., *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *Childress v. Middleton Arms, L.P. (In re Middleton Arms, Ltd. Partnership)*, 934 F.2d 723, 725 (6th Cir. 1991) ("The equitable powers of section 105(a) may only be used in furtherance of the goals of the [Bankruptcy] Code.").

Some courts facing issues of CERCLA liability in a bankruptcy action have refused to interpret the Code beyond its plain meaning. "[T]he comprehensive nature of the bankruptcy statute does not relieve us of the obligation to construe its terms, nor may we resolve all issues of statutory construction in favor of the 'fresh start' objective, regardless of the terms Congress has chosen to express its will." *United States v. LTV Corp. (In re Chateaugay)*, 944 F.2d 997, 1002 (2d Cir. 1991).

139. For a full discussion of the facts of *CMC Heartland Partners*, see *supra* notes 104-23 and accompanying text.

directing a responsible party to clean up a hazardous waste site.¹⁴⁰ Currently, CERCLA does not restrict EPA's time period for removing a threat posed by a release or threat of a release of a hazardous substance.¹⁴¹ Thus, there was no obligation on EPA to have brought an action against CMC under CERCLA any time prior to when it actually did. As current owner of Wheeler Pit at the time of the action, CMC was liable under section 107(a).¹⁴²

The *CMC Heartland Partners* decision is a logical extension of the reasoning behind the Supreme Court's ruling in *Kovacs*.¹⁴³ The Court in *Kovacs* discharged an injunction against the defendant finding it to be a claim dischargeable within the meaning of the Bankruptcy Code.¹⁴⁴ However, in dicta, the Court specifically stated that it was not holding that a party may ignore state environmental regulations simply because of the party's bankruptcy proceedings.¹⁴⁵ This was the situation in *CMC Heartland Partners*. That CMC was borne of a bankruptcy reorganization was irrelevant; CERCLA is an environmental regulation, and EPA is authorized to determine when a site is in violation of CERCLA and take appropriate

140. CERCLA § 106(a), 42 U.S.C. § 9606(a). For a full discussion of § 106(a), see *supra* notes 36-41 and accompanying text.

141. "There exists no statute of limitations under the terms of CERCLA itself by which EPA must respond to a release or else lose its right to seek relief against PRPs." *In re National Gypsum Co.*, 139 B.R. at 408. CERCLA does, however, impose a statute of limitations for claims against the Superfund for the recovery of costs and for recovery for damages. See CERCLA § 112(d)(1), 42 U.S.C. § 9612(d)(1). There is also a statute of limitations governing when a civil action can be brought for recovery of costs and recovery of damages. See CERCLA § 113(g), 42 U.S.C. § 9613(g). These provisions were added under the SARA amendments of 1986. Congress imposed these limitations in part to "provide a finality to affected responsible parties." H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 79 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2861.

142. Under this approach, the court seemingly avoids any conflict between the policies of CERCLA and those of bankruptcy law. The court simply viewed the liability under CERCLA as a statutory obligation which, according to *Kovacs*, required compliance by the current owner. In fact, as noted at the end of the decision, CMC admitted at oral argument that if Wheeler Pit was in fact releasing hazardous waste, it had an obligation to pay. *CMC Heartland Partners*, 966 F.2d at 1148. Consequently, the court characterized CMC's action as merely an attempt to avoid the § 113(h) bar to pre-enforcement judicial review. *Id.* CMC had contested its liability by arguing that, in addition to EPA's claim being barred by the bankruptcy proceedings, the contamination found by EPA was not created by the waste at Wheeler Pit, and thus CMC was not obligated to clean up the site. *Id.*

143. 469 U.S. 274 (1985).

144. *Id.* at 280. For a discussion of *Kovacs*, see *supra* notes 97-100 and accompanying text.

145. "Plainly [the party in possession] may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." *Id.*

action.¹⁴⁶ In light of *Kovacs*, in this case the determination of whether EPA action constitutes a “claim” was irrelevant.¹⁴⁷ Furthermore, the Supreme Court also made it clear in *Midlantic* that when faced with a threat to public health and environment, the bankruptcy policies aimed at a “fresh start” for the debtor are overridden.¹⁴⁸

CMC Heartland Partners highlights the problems presented by attempting to resolve the conflict between CERCLA and the Bankruptcy Code. In its decision, the court acknowledged that “the public gains less from relief in 1992 than from a cleansing in 1974 or 1985, for noxious substances have escaped in the interim.”¹⁴⁹ Not only does this result contravene the goals of CERCLA, but it also violates a fundamental principle of bankruptcy law identified by the court:

[B]ygone should not prevent the best current deployment of assets. Sunk costs and their associated promises to creditors create problems of allocation when the firm cannot

146. For a discussion of the CERCLA statutory scheme, see *supra* notes 17-43 and accompanying text.

147. The Seventh Circuit summarily acknowledged that EPA would have had a claim dischargeable in bankruptcy without any further analysis. *CMC Heartland Partners*, 966 F.2d at 1146. However, it is clear that under the standard adopted by the Seventh Circuit immediately following this case, EPA would have had a “claim,” had the court engaged in a more thorough analysis. In *In re Chicago, St. Paul, Milwaukee & Pacific Railroad*, also decided under the provisions of the former Bankruptcy Act, the Seventh Circuit held that when a potential CERCLA claimant could link a debtor with contamination, and the potential claimant had conducted tests regarding the contamination, then the potential claimant had at least a contingent claim. *Chicago, Milwaukee*, 974 F.2d 775, 786 (7th Cir. 1992). For a discussion of *Chicago, Milwaukee*, see *supra* note 85. Under that standard, there is no dispute that EPA had at least a contingent claim prior to the Railroad’s filing for bankruptcy. EPA had been aware of the hazardous waste dumped at Wheeler Pit five years prior to the Railroad’s filing. Appellant’s Brief, *supra* note 104, at 10. Furthermore, EPA put the site on the NPL almost two years prior to the post-petition bar date. *Id.* at 11. There is also no dispute that EPA knew of the bankruptcy proceedings.

148. The bankruptcy court in *In re Peerless Plating Co.* suggested a result similar to that in *CMC Heartland Partners*. In *Peerless Plating Co.*, EPA brought an action against the trustee to recover costs incurred in cleaning up a hazardous waste site. 70 B.R. 943, 945 (Bankr. W.D. Mich. 1987). EPA argued that those claims should be considered an administrative expense. *Id.* The trustee argued that the claim should not have been considered an administrative expense because the trustee could have abandoned the property. *Id.* at 946. Turning to *Midlantic*, the court determined that the site in question presented a threat to the public health and thus could not be abandoned. *Id.* at 947-48. The trustee further argued that even if that were so, EPA’s claim was barred because it arose pre-petition. *Id.* at 948. Without deciding whether this was a claim or not, the court held that such a determination was irrelevant because the estate was the current owner of the site and was liable. *Id.*

149. *CMC Heartland Partners*, 966 F.2d at 1147.

pay its debts as they come due. But assets that cannot generate enough revenue to pay all claims may still produce net profits from current operations. So bankruptcy cleaves the firm in two. Existing claims must be satisfied exclusively from existing assets, while the "new" firm, created as of the date the petition is filed, carries on to the extent current revenues allow.¹⁵⁰

Although the hazard posed by the Wheeler Pit site still exists, the disposal of the wastes creating the hazard on the site is a "bygone," occurring long before commencement of the bankruptcy proceeding.¹⁵¹

Had EPA brought an action under section 106(a) to enjoin CMC as the current owner of the property to take remedial action, assets existing at the time of the bankruptcy would have been deployed to satisfy EPA's claim prior to the bankruptcy. The same would have happened had EPA brought the action prior to the debtor's filing for bankruptcy. The difference is that assets of the debtor, prior to its reorganization, could have been used to satisfy and discharge the claim *then*, instead of EPA's bringing the action four years later against the reorganized debtor. This result would have furthered the goals of CERCLA by removing the threat sooner. It would also have provided a fresh start for CMC by relieving CMC of future liability for cleanup of the Wheeler Pit site.

Subsequent to placing Wheeler Pit on the NPL in 1984, and one year prior to the bankruptcy bar date, EPA had grounds for bringing a section 106(a) action. Placement on the NPL indicates that EPA believes a site may pose or does pose an imminent threat to the public health or environment.¹⁵² Therefore, EPA apparently had sufficient grounds for bringing a section 106(a) action before the bankruptcy closed, but did not do so. The court ignores this issue and the result in this case underscores the fact that EPA has no obligation under CERCLA to take action even when inaction may result in injury to the public health or environment.¹⁵³ As this

150. *Id.* at 1146 (citing *Boston & Maine Corp. v. Chicago Pac. Corp.*, 785 F.2d 562 (7th Cir. 1986)).

151. Clearly the threat is ongoing and not a bygone. As the court itself stated, any liability CMC has as an operator or manager was discharged. *Id.*

152. For a discussion of the criteria for placement on the National Priorities List, see *supra* notes 22-26 and accompanying text. This is the same standard which must be established before EPA can take action under § 106(a). See CERCLA § 106(a), 42 U.S.C. § 9606(a).

153. *Peerless Plating Co.* addressed an analogous issue. The court granted administrative priority to EPA claims. The trustee argued that EPA's claims should be equitably subordinated because of EPA's "bad faith." *Peerless Plating Co.*, 70 B.R.

decision demonstrates, EPA can bring a section 106(a) action at any time regardless of the defendant's past or present identity as a debtor. As a result of this decision, EPA can run "CERCLAs" around bankruptcy law.

IV. IMPACT

The decision of the Seventh Circuit in *CMC Heartland Partners* encourages EPA to plan remediation around PRPs' bankruptcy filings. This contradicts CERCLA's policies of forcing immediate cleanup of hazardous waste.¹⁵⁴ During the time EPA is aware of a threat, but fails to take any cleanup action, there may be an actual release. That release, by EPA's own determination, endangers the health and safety of the public and the environment.¹⁵⁵ This result clearly subverts Congress' intent in enacting CERCLA.

This result is also contrary to the goals of bankruptcy law. In light of this decision, EPA may sit on a claim it knows to exist during a PRP's bankruptcy proceedings, and wait until the debtor has reorganized to bring an action under section 106(a). Although this result fulfills CERCLA's mandate to make the responsible party pay, it undermines the bankruptcy law's "fresh start" policy and harms the debtor in several ways. First, it leaves the debtor without the normal protections of the Code. For instance, under the facts of *CMC Heartland Partners* and following the holding of *Midlantic*, the trustee could not abandon the site because it was not in compliance with environmental regulations. Furthermore, in reality, there was little chance that the trustee could have sold the land, given EPA's listing of the site on the NPL in 1984. Finally, if the potential liability for a CERCLA claim survives bankruptcy, a reorganized debtor may have difficulty obtaining credit, customers, or capital necessary to continue its business. Average cleanup costs for a hazardous waste site are currently estimated to be 35 to 40 million dollars.¹⁵⁶ Liability of this magnitude chills any inclination a debtor may have

at 948. EPA had "barged in" to the bankruptcy proceedings and delayed its administrative expense request until after cleanup concluded. *Id.* The court refused the trustee's request finding that EPA's actions came "not from malice but from a lack of bankruptcy expertise." *Id.* This leaves open the issue of whether any malice, or failure to act in a timely manner, would affect at least this court's decisions concerning CERCLA claims in bankruptcy.

154. For a full discussion of the CERCLA provision barring judicial review prior to enforcement of CERCLA, see *supra* notes 40-43 and accompanying text.

155. The court in *CMC Heartland Partners* acknowledged that cleanup taken years after the site becomes a threat does not benefit the public as much as earlier action would have. *CMC Heartland Partners*, 966 F.2d at 1147.

156. *EPA Hearings*, *supra* note 4.

of restarting a business, thus encouraging debtors to liquidate instead of reorganizing.¹⁵⁷

CMC Heartland Partners demonstrates the need for Congress to address the issues arising from the conflict between CERCLA and bankruptcy law. As EPA becomes more effective in addressing hazardous waste problems, more suits will be brought against PRPs, including those in bankruptcy. Some consensus is needed to provide consistency in the courts and predictability for the PRPs. That consensus should be part of any changes made when Congress reauthorizes CERCLA in September 1994.

The Clinton Administration is currently re-evaluating the entire statute, proposing liability and enforcement changes with the goal of enabling EPA to administer CERCLA as cheaply and effectively as possible.¹⁵⁸ Part of achieving that goal involves making enforcement of the requirements more fair, reducing the cost of enforcement, and increasing the effectiveness of cleanups.¹⁵⁹

Consistent with these goals, and with providing an equitable solution to the *CMC Heartland Partners* problem, would be an amendment to CERCLA which imposes an obligation on EPA to take action to clean up any site listed on the NPL within a certain period after listing. Listing on the NPL currently imposes no such obligation on EPA, nor does it have any legal effect on the liability of the responsible party. Yet placement on the NPL indicates that EPA believes the site may pose a threat to the public health or environment.¹⁶⁰ Thus, as it currently exists, CERCLA contradict its own policies. CERCLA demands that EPA identify hazardous waste sites in order to ultimately remove a threat to the public. Yet, CERCLA does not demand that EPA take action within a certain timeframe to abate a threat as soon as possible.

157. The *Chateaugay* court noted:

A determination that the CERCLA response costs ultimately to be incurred are not now claims might impair the prospects of achieving a viable reorganization, with the result that the debtor, instead of reorganizing, liquidates under Chapter 7 or dissolves under state law, and the assets of the corporation are either unavailable for environmental cleanup costs because such costs are not "claims" entitled to pro rata payment, or available only to the limited extent that such costs are considered unaccrued claims for which reserves must be established under state law.

Chateaugay, 944 F.2d at 1002.

158. *EPA Hearings*, *supra* note 4.

159. *Id.*

160. See *supra* notes 22-24 and accompanying text. This is the same standard EPA uses to determine if it will take action under CERCLA.

An amendment which mandates that EPA take action within a certain period after NPL listing, or under other certain circumstances, will further the goals of both CERCLA and the bankruptcy laws. First, cleanup will commence sooner, thus eliminating the threat sooner. Second, the debtor will be aware of liability which may then be taken into account during the bankruptcy. Thus, this suggested amendment would provide for speedier cleanup—the goal of CERCLA. It would also provide for more predictability and better protection for debtors—the goal of the bankruptcy laws.

Catherine A. Barth

